

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 23

Public Utilities Commission of the State
of California,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

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Subject Index

	Page
I. The Public Utilities Commission of the State of California is both a court (judicial tribunal) and an administrative agency and is lawfully competent to pass upon the constitutionality of Section 530 of the Public Utilities Code	2
II. The contention made by appellee that Section 530 of the Public Utilities Code, if enforced, would subject agents of the United States to penal action is wholly without foundation	4
III. Appellee misconstrues the true purpose of the Johnson Act	7

Table of Authorities Cited

Cases	Pages
Chieot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 84 L. ed. 329	8
Kline v. Burke Construction Co., 260 U.S. 226, 67 L. ed. 226	8
Loustalot v. Superior Court, 30 Cal. (2d) 905	3
Miller v. Railroad Commission, 9 Cal. (2d) 190	3
O'Donoghue v. United States, 289 U.S. 516, 77 L. ed. 1356	3
Pacific Tel. and Tel. Co. v. City of Los Angeles, 44 Cal. (2d) 272	3
Pacific Tel. and Tel. Co. v. Eshleman, 166 Cal. 640	2, 3
People v. Bruce (C.C.A. 9th, 1942), 129 F. (2d) 421, cert. den. by Sup. Ct., 317 U.S. 678, 87 L. ed. 544	8
People v. Western Air Lines, 42 Cal. (2d) 621	2
Pickens v. Johnson, 42 Cal. (2d) 399	3
Sexton v. A.T. & S.F. Ry. Co., 173 Cal. 760	2
United States v. Farrar, 281 U.S. 624, 74 L. ed. 1078	4
Statutes	
Johnson Act, 28 U.S.C. 1342 (62 Stat. 932)	7
California Constitution:	
Art. XII	2
Art. XII, Sec. 22	3
California Public Utilities Code:	
Section 307	5
Section 458	5, 6
Section 459	5, 6
Section 530	2, 4, 5, 6, 7
Section 1759	3
Sections 2101-2113	5
Section 2112	4, 6

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APPELLANT'S REPLY BRIEF.

Because of the fact that Appellee's brief was received only a few days ago, and due to the further fact that counsel for the Appellant must take the time to journey to Washington for the argument of the above-entitled case on January 7th, and the exigencies of time resulting therefrom, Appellant is able to reply to only a limited number of matters raised in the brief of Appellee. How-

ever, by filing this limited reply brief, the Appellant wishes it distinctly understood that it is not admitting the validity of any of the several contentions made by the Appellee in its brief.

I.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA IS BOTH A COURT (JUDICIAL TRIBUNAL) AND AN ADMINISTRATIVE AGENCY AND IS LAWFULLY COMPETENT TO PASS UPON THE CONSTITUTIONALITY OF SECTION 530 OF THE PUBLIC UTILITIES CODE.

Unlike any other regulatory agency of which we are aware, the Public Utilities Commission of California is both a judicial tribunal and an administrative tribunal. The judicial power which the Commission exercises is the judicial power of the State of California, such jurisdiction having been taken away from the courts of California and deposited with the Commission pursuant to Article XII of the State Constitution and the Public Utilities Act. The judicial authority exercised is not merely quasi-judicial; it is strictly judicial in every respect. (*Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 650, 689; *People v. Western Air Lines*, 42 Cal. (2d) 621, 630-632; *Sexton v. A. T. & S. F. Ry. Co.*, 173 Cal. 760, 762-764.) Even in the exercise of its administrative-legislative jurisdiction, the Commission acts strictly judicially. (*Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 650; *People v. Western Air Lines*, 42 Cal. (2d) 621, 630-632.) The Supreme Court of California has held that the Commission exercises judicial power of great moment. (*Pacific Telephone and Telegraph Co. v.*

Eshleman, 166 Cal. 640, 650.) The Commission and each member thereof have the same power to commit for contempt as does any court of record. (Section 22, Article XII, Constitution of California.) As an illustration of the quality of the judicial power exercised by the Commission, the Commission has authority to set aside a final judgment of a state court (Superior Court) even though such judgment had been affirmed by the Supreme Court of California. (*Miller v. Railroad Commission*, 9 Cal. (2d) 190, 195, 198.) Until reversed by the Supreme Court of California, decisions of the Commission must be respected by all state courts. (*Loustalot v. Superior Court*, 30 Cal. (2d) 905, 912.) No state court except the Supreme Court has any jurisdiction over the action of the Commission. (Section 1759, Public Utilities Code.) The Public Utilities Act is the supreme law of the state (so far as state law is concerned) in all matters touching public utility regulation and takes precedence over any provision of the State Constitution or of a statute which conflicts therewith. (*Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 658; *Pickens v. Johnson*, 42 Cal. (2d) 399, 404.) The regulatory authority of the Commission is exclusive. (*Pacific Telephone and Telegraph Co. v. City of Los Angeles*, 44 Cal. (2d) 272, 280.)

As this court well knows, it is elementary that there is no Federal constitutional inhibition against a state combining in one agency both judicial and legislative powers. (*O'Donoghue v. United States*, 289 U.S. 516, 545-546, 77 L. ed. 1256, 1368.)

The foregoing answers the contention of Appellee that the Public Utilities Commission cannot provide a forum

for testing the constitutionality of Section 530 of the Public Utilities Code.

II.

THE CONTENTION MADE BY APPELLEE THAT SECTION 530 OF THE PUBLIC UTILITIES CODE, IF ENFORCED, WOULD SUBJECT AGENTS OF THE UNITED STATES TO PENAL ACTION IS WHOLLY WITHOUT FOUNDATION.

The contention made by the Appellee that an agent of the Federal government would subject himself to the penal provisions of Section 2112 of the Public Utilities Code, or any other penal provision of California law, by paying for transportation something other than the rate approved by the Commission, is wholly without foundation. This court held in the case of *United States v. Farrar*, 281 U.S. 624, 634, 74 L. ed. 1078, 1081, that the purchaser of illicit liquor did not commit a crime by such act even though it was admitted that the purchaser knew that the liquor was illicit and that the sale thereof constituted a violation of law. This court held in that case that only the seller violated the law. Merely purchasing a commodity with knowledge that it is being sold in violation of law constitutes no crime, unless the statute so specifies.

Additionally, no action would be taken against an agent of the United States, in the circumstances here presented, and we speak with authority because any penal action taken against an agent of the United States must be initiated by the attorney for the Public Utilities Commission. The attorney for the Commission represents the People of the State of California and the Commission

in all matters involved under the Public Utilities Act; (Section 307, Public Utilities Code.) It is here pointed out that Part 1 of the Public Utilities Code is the Public Utilities Act and Section 530 of the Code is a part of the Public Utilities Act, as are the penal provisions contained in Sections 2101-2113 of that Code. There are two provisions of the Public Utilities Act which denounce as unlawful the conduct of a shipper which are found in Sections 458 and 459 of the Public Utilities Code.¹

It will be noted from the language of these two sections that something far more than merely paying for trans-

1458. No common carrier, or any officer or agent thereof, or any person acting for or employed by it, shall, by means of known false billing, classification, weight, weighing, or report of weight, or by any other device or means assist, suffer, or permit any corporation or person to obtain transportation for any person or property between points within this State at less than the rates and fares then established and in force as shown by the schedules filed and in effect at the time.

No person, corporation, or any officer, agent, or employee of a corporation shall, by means of false billing, false or incorrect classification, false weight or weighing, false representation as to contents or substance of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent of connivance of a common carrier or any of its officers, agents, or employees, seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor.

459. No person or corporation, or any officer, agent, or employee of a corporation, shall knowingly, directly or indirectly, by any false statement or representation as to cost or value; or the nature or extent of an injury, or by the use of any false billing, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, or upon any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, rebate, or payment for damage, in connection with or growing out of the transportation of persons or property, or an agreement to transport such persons or property, whether with or without the consent or connivance of a common carrier or any of its officers, agents, or employees. No common carrier, or any of its officers, agents, or employees, shall knowingly pay or offer to pay any such allowance, rebate, or claim for damage.

portation at a price other than the tariff rates must be engaged in before the provisions of those two sections would be violated by a shipper. The provisions of Section 2112 of the Public Utilities Code, which Appellee appears to fear, cover the denounced conduct in Sections 458 and 459 and further prescribe that anyone who procures, aids, or abets any public utility in violation or non-compliance is guilty of a misdemeanor. Obviously, under the well recognized rules of strict construction of penal statutes, there would have to be proven some conspiracy or some conduct over and above the mere paying for transportation at some rate other than the tariff rate to violate Section 2112 of the Code. Furthermore, where, as here, the United States is setting up a claim of constitutional and statutory immunity, no penal action would be taken against an agent of the United States until the claim of immunity had been finally adversely determined in the courts.

The undersigned attorney for the People of the State of California and the Commission unhesitatingly makes the foregoing as a stipulation.

If this court reverse the judgment of the District Court and order the dismissal of the complaint, the only action which would be taken by the Commission or its attorney, in case a carrier violated any order of the Commission establishing rates for traffic of the United States pursuant to the provisions of Section 530 of the Public Utilities Code, would be either an administrative proceeding before the Commission, to discipline the carrier, in which proceeding all defenses based on the ground of immunity of the United States could be presented, or by

the filing of a penal action in the Superior Court of California against the carrier, where an opportunity would be available to present any and all defenses on the ground of immunity of the United States. These proceedings would go through the state courts and finally reach this court. The Commission has full authority to stay the effect of any of its orders promulgated pursuant to the provisions of Section 530 of the Public Utilities Code pending the outcome of litigation, and the Supreme Court of California, also, has such authority. So it will be seen that the fears of the Appellee with regard to any penal action to be taken against an agent of the United States are wholly without foundation.

Of course, the foregoing proceeds upon the theory that there would not be any agreement or reconciliation arrived at by and among the Commission, the carriers, and the United States. We firmly believe that some reasonable program would be arrived at, thus making wholly inapplicable any thought of penal action being taken against either the carriers or any agent of the United States.

III.

APPELLEE MISCONSTRUES THE TRUE PURPOSE OF THE JOHNSON ACT.

Appellee contends that the Johnson Act has no application to the United States. Using Appellee's own expression, this contention is misplaced. The Johnson Act *deprives* a United States District Court of all jurisdiction with regard to a rate order of a state agency, if certain requirements are met. Therefore, there is no forum to

which the United States may resort in a case of that kind because the jurisdiction has been *withdrawn*. This court has held in many cases that the United States District Court is a court of *limited jurisdiction* and that it has only such jurisdiction as Congress has seen fit to confer upon it. If Congress so desired, it could withdraw all jurisdiction from the United States District Court. Thus, it is seen that this is not a question of jurisdiction as to parties, but is a question of jurisdiction as to the court itself. (*Kline v. Burke Construction Co.*, 260 U.S. 226, 233-234, 67 L. ed. 226; *People v. Bruce* (C.C.A. 9th 1942), 129 F. (2d) 421, 423, certiorari denied by Supreme Court, 317 U.S. 678, 87 L. ed. 544; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376, 84 L. ed. 329, 333.)

Dated, San Francisco, California,
December 31, 1957.

Respectfully submitted,

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